Supreme Court, U.S.
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No. 88-1011

In the Supreme Court of the United States

OCTOBER TERM, 1988

JAMES D. HARMAN, APPELLANT

v.

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether appellant stated a claim under the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, in alleging that he was terminated from employment because he was farsighted.

2. Whether the district court lacked jurisdiction to entertain appellant's challenge to the Merit Systems Protection Board's affirmance of his termination based on unacceptable performance.

3. Whether appellant's constitutional attack on the termination of his employment is barred under *Bush* v. *Lucas*, 462 U.S. 367 (1983).

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OPINIONS BELOW

The opinion of the Presiding Official of the Merit Systems Protection Board (App., *infra*, 1a-29a) is unreported. The opinion of the Merit Systems Protection Board is reported at 27 M.S.P.R. 293, 303 (1985). The decision of the Equal Employment Opportunity Commission (App., *infra*, 30a-35a) is unreported. The opinion of the district court (J.S. App. E2-E15) is unreported. The summary affirmance of the district court's judgment by the court of appeals (J.S. App. E16-E17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1988. The jurisdictional statement was filed on November 17, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

STATEMENT

Appellant contends that the courts below improperly dismissed his claim of discriminatory removal from federal service in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, and the Constitution. He also contends that the courts below erred in concluding that the district court lacked jurisdiction to review the Merit Systems Protection Board's decision insofar as it affirmed his removal on grounds of unacceptable performance.

1. Appellant formerly worked as a coal mine safety and health inspector with the Mine Safety and Health Administration of the United States Department of Labor (App., *infra*, 1a). In 1984, the Department terminated appellant's employment for unacceptable performance (*ibid.*). The Department based its action on appellant's failure to issue citations at mines that had improperly stored explosives, that had no escapeway, and that had various mechanical deficiencies, and on appellant's errors or omissions in 4 of the 21 citations issued by him (*id.* at 9a). Appellant appealed the Department's decision to the Merit Systems Protection Board (MSPB or Board), alleging, *inter alia*, that the Department's action was the result of discrimination on the basis of physical handicap (*id.* at 16a-17a). Specifically, he maintained that the Department had failed to "accommodate his poor eyesight" (*id.* at 17a).

On July 10, 1984, an MSPB presiding official (PO)[1] found that appellant's termination was supported by substantial evidence and that his claim of discrimination was

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[1] The PO is an official authorized by the Board to preside over hearings and issue initial decisions. See 5 C.F.R. 1201.4(a), 1201.41, 1201.111. The PO's initial decision becomes the final decision of the Board after 35 days unless a party petitions the Board for review or the Board sua sponte reopens the case. 5 C.F.R. 1201.113.

meritless (App., *infra,* 13a, 17a). The PO acknowledged that appellant's vision tests revealed that he was farsighted, but pointed out that the Department had consequently issued him safety glasses (*id.* at 17a). The PO concluded that "[n]eeding a pair of reading glasses does not render this appellant a qualified handicapped person because there was no evidence proffered that the appellant's impaired eyesight had substantially limited one of his major life activities" (*ibid.*). Moreover, even assuming appellant's impaired vision qualified him as a handicapped person within the meaning of the Rehabilitation Act, the PO found that the Department had reasonably accommodated any impairment by providing him with glasses and that upon receipt of the glasses, his eyesight problem "could no longer be said to impair his ability to engage in a major life function." *Ibid.* The MSPB affirmed, *sub nom. Donaldson* v. *Department of Labor*, 27 M.S.P.R. 293, 303 (1985).

2. Appellant then sought review by the Equal Employment Opportunity Commission (EEOC) of the MSPB's final opinion and order on the issue of handicap discrimination (see 5 U.S.C. 7702(b)(1)). The EEOC agreed that there was no discrimination in appellant's removal (App., *infra*, 23a). First, the EEOC concluded that appellant had failed to show he was handicapped by being farsighted, as no "major life activities [are] substantially limited" by that condition. *Ibid.* It added that "[a]t most, [appellant's] eye examination indicated he probably needed a correction for close work, such as reading," and that "[t]his condition was easily corrected by glasses," which the Department had provided to appellant. *Ibid.* Even assuming that appellant's condition was a handicap, the EEOC observed that since the Department had issued appellant a pair of prescription safety glasses within 10 days of the date when he was placed on a 90-day perform-

ance improvement plan, "[i]t is clear that any deficiencies that may have existed in [appellant's] performance were not due to difficulties in reading" (*ibid.*).

3. Appellant then brought this action in the United States District Court for the Middle District of Pennsylvania.[2] The complaint contained 13 counts, all arising out of his allegedly improper termination (J.S. App. E5).[3] After allowing appellant to amend his complaint twice, the district court dismissed his action (*id.* at E2-E15). The court concluded that appellant had failed to state a claim under the Rehabilitation Act and that, in the absence of a claim of prohibited discrimination, the district court had no jurisdiction to review the merits of the MSPB's decision that petitioner had been terminated for unacceptable performance.

The court first determined that appellant's farsightedness "is not the type of handicap that that act was designed to ameliorate" (J.S. App. E8 (citing *Forrisi* v. *Bowen*, 794 F.2d 931, 933-934 (4th Cir. 1986)). Accordingly, appellant had not alleged a discriminatory basis for his termination. As to appellant's remaining challenges to the MSPB's ruling, the court held that he "may only seek review of final orders or decisions of the [MSPB] that relate to [the merits of his discharge] in the United States Court of Appeals for

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[2] Pursuant to 29 U.S.C. 794a(a)(1), a person complaining of discrimination by a federal agency in violation of Section 501 of the Rehabilitation Act, 29 U.S.C. 791, is accorded the remedies, procedures, and rights set forth in Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, including trial de novo in federal district court and, in the district court's discretion, court-appointed counsel. See 42 U.S.C. 2000e-16(c), cross-referencing 42 U.S.C. 2000e-5.

[3] The complaint named as defendants Ann McLaughlin (then-Acting Secretary of Labor), James Schoffstall (petitioner's immediate supervisor), and John B. Shutack (another officer or employee of the Mine Safety and Health Administration).

the Federal Circuit" (J.S. App. E10-E11). Finally, the court concluded (*id.* at E11-E15) that none of the other statutory or regulatory provisions relied upon by appellant provided him a cause of action against respondents in federal district court.[4] The Third Circuit affirmed in an unpublished order (*id.* at E16-E17).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted. Moreover, this case does not fall with this Court's appellate jurisdiction under former 28 U.S.C. 1252, and the appeal should thus be dismissed.[5] Treating the jurisdictional statement as a petition for a writ of certiorari, see 28 U.S.C. 2103, the petition should be denied.

1. Appellant's principal contention (J.S. 14) is that the courts below erred in holding that he had failed to allege a discriminatory basis for his removal. This contention is without merit.

As the district court recognized (J.S. App. E7-E8), the plain language of the Rehabilitation Act refutes appellant's claim that he is "handicapped" because of his far-

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[4] Appellant had relied, *inter alia*, on purported causes of action arising under 5 U.S.C. 7203 (authorizing the promulgation of rules prohibiting discrimination because of a handicapping condition), 5 U.S.C. 4301 (defining terms with respect to performance appraisal), 18 U.S.C. 241 (conspiracy to violate civil rights), 18 U.S.C. 1001 (false statements), and 18 U.S.C. 1621 (perjury). The district court found that these statutes, as well as others cited in the complaint, did not give rise to private causes of action for appellant.

[5] Appellant has not properly invoked this Court's jurisdiction under 28 U.S.C. 1252 (repealed by the Act of June 27, 1988, Pub. L. No. 100-352, § 1, 102 Stat. 662, effective September 25, 1988), since the judgment below did not hold unconstitutional any Act of Congress.

sightedness. The Act defines "individual with handicaps" to mean a person with "a physical or mental impairment which *substantially* limits one or more of such person's *major* life activities." 29 U.S.C. 706(8)(B)(i) (Supp. IV 1986) (emphasis added). "The burden is on the plaintiff to establish the existence of an impairment that substantially limits a major life activity as an element of the plaintiffs' prima facie case." *Jasany* v. *United States Postal Service*, 755 F.2d 1244, 1249 (6th Cir. 1985). As a matter of common sense, farsightedness that can be wholly corrected with glasses cannot be considered a substantial limitation of a major life activity. See *Jasany*, 755 F.2d at 1249 (rejecting claim that a postal worker with crossed eyes established a prima facie case of handicap discrimination); cf. *Padilla* v. *City of Topeka*, 238 Kan. 218, 708 P.2d 539 (1985) (rejecting claim that a police force applicant whose glasses made his vision 20/20 was a "handicapped person" for purposes of 29 U.S.C. 794). This result is fully consistent with the purposes of the Rehabilitation Act, which "assures that *truly disabled*, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps." *Forrisi* v. *Bowen*, 794 F.2d at 934 (emphasis added); *E.E. Black Ltd.* v. *Marshall*, 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980).[6]

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[6] If appellant were "handicapped" by virtue of his poor eyesight, he would still have to show as an element of his prima facie case that the adverse action of which he complains occurred "under circumstances which gave rise to the inference that [the action] was based solely on his handicap." *Jasany* 755 F.2d at 1250 n.5. In this case, however, the Department fully accommodated appellant's condition by providing him with prescription safety glasses that corrected his farsightedness. See App., *infra*, 25a. Even after he received corrective safety glasses, appellant failed to perform satisfactorily. *Ibid.* Under these circumstances, it is plain that appellant's unsatisfactory performance,

2. Appellant also challenges the holding below (J.S. App. E10-E11) that he failed to establish a jurisdictional basis for district court review of the merits of the MSPB's decision affirming his discharge for unacceptable performance. Appellant's argument on this point has no legal support. The Federal Circuit has exclusive jurisdiction of an appeal from a final order or decision of the MSPB in an adverse action case (see 5 U.S.C. 7703(b)(1)). It has been held that in a so-called "mixed" case—an appealable adverse action in which appellant makes a colorable claim of prohibited discrimination as one basis for the action—a federal district court may review all aspects of the MSPB decision. See *Williams* v. *Department of Army*, 715 F.2d 1485, 1487-1491 (Fed. Cir. 1983) (en banc). But frivolous allegations of discrimination cannot defeat the Federal Circuit's exclusive jurisdiction of MSPB appeals. See *Hill* v. *Department of the Air Force*, 796 F.2d 1469, 1471 (Fed. Cir. 1986). If any allegation of discrimination were enough to obtain a plenary hearing in district court, federal employees could easily circumvent the Federal Circuit's exclusive jurisdiction and obtain district court review simply by adding frivolous claims of discrimination to their complaints. That would place an unwarranted burden on the district courts and disrupt Congress's scheme for judicial review of federal employment decisions. Because appellant failed to make even a threshold showing of unlawful discrimination, the court below properly affirmed the district court's decision that it lacked jurisdiction to review the merits of the adverse action appeal.[7]

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not any eyesight problem, formed the basis for his termination from employment.

[7] Nor is there any obligation by the district court to transfer the case to the Federal Circuit. As the court explained in *Williams*, "[t]he dis-

3. Finally, there is no merit to appellant's constitutional claims. As this Court explained in *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983), "[f]ederal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." Because "[c]onstitutional challenges to agency action, such as [those raised by appellant], are fully cognizable within this system" (*id.* at 386), this Court has concluded that it would be inappropriate to supplement that regulatory scheme with a new judicial remedy founded directly on the United States Constitution. Since appellant's claims are fully comprehended by the review procedure culminating in the decision of the MSPB, he cannot rely on the Constitution as a basis for bringing a new district case arising out of the same events.

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trict courts have ample authority to dismiss cases based on frivolous or sham discrimination claims," and they "need not transfer even legitimate merits issues where a litigant has made abusive use of the judicial system." 715 F.2d at 1491. Otherwise, the mixed-case rule would "enable litigants to forum shop between district courts and this court by merely alleging discrimination." *Ibid.*

CONCLUSION

The appeal should be dismissed; treating the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY G. THORN
Acting Solicitor
Department of Labor

MARCH 1989

APPENDIX

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

Initial Decision Number PH04328410287

JAMES D. HARMAN

v.

DEPARTMENT OF LABOR

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10 July 1984

INTRODUCTION

This is an appeal from the Department of Labor's decision to remove James D. Harman, appellant, from his position as a coal mine safety and health inspector, effective March 13, 1984. The appellant filed an appeal petition on March 16, 1984. At his request, a hearing was held on June 5-6, 1984, in Wilkes-Barre, Pennsylvania. The record of the case was closed on June 6, 1984.

JURISDICTION

Under 5 U.S.C. § 7701(a), an employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any law, rule or regulation. Applicable law and regulation provide that an employee in the competitive service who is not serving a probationary period may appeal an action removing him for unacceptable performance. 5 U.S.C. § 4303(e); 5 CFR 1201.3(a)(1); 5 CFR 432.206(a). The record shows that the

appellant was an employee in the competitive service who was not serving a probationary period and who was removed for unacceptable performance under 5 U.S.C. § 4304. Accordingly, this appeal is acceptable for adjudication.

ANALYSIS AND FINDINGS

In *Wells* v. *Harris*, 1 MSPB 199 (1979), the Board noted that 5 U.S.C. § 4303(a) ". . . . authorizes actions under that section only against employees for failure to meet performance standards which have been established as part of Section 4302 performance appraisal systems." *Id.* at 216-217. Pursuant to 5 U.S.C. § 4304(b), the Office of Personnel Management (OPM) must review all such performance appraisal systems to be sure they are in compliance with statutory requirements. *See also* 5 CFR 430.206. The appellant alleges that the performance evaluation system under which his performance was measured, was not in compliance with the law. Specifically, the appellant complained that he had been evaluated under a five tier system and that the five tier system did not meet the requirements of 5 U.S.C. § 4302(b)(1) as interpreted by the Office of Personnel Management in FPM Letter 430-4 March 19, 1981. My scope of review of this issue is limited to determining whether the agency has abused its discretion in establishing the standards at issue, and whether the application of the standards caused the appellant any harm. *Hoesl* v. *Department of the Navy,* MSPB Docket No. SF04328310552 (March 1, 1984).

During the hearing of the instant case, the parties stipulated that their presentations with regard to this issue would be substantially similar to the ones given during the hearing of *Donaldson* v. *Department of Labor,* MSPB Initial Decision Number PH04328310487 (December 22, 1983). Therefore, the presiding official agreed to incor-

porate the relevant evidence presented in the *Donaldson* case, into the *Harman* v. *Department of Labor* case with regard to this issue only, thereby avoiding having the parties relitigate the issue at the *Harman* hearing. In *Donaldson,* the appellant argued that the agency's performance appraisal system was fatally defective and as applied to the appellant, constituted harmful procedural error. Specifically, the appellant argued that the appraisal system had five performance levels, but only established one written standard for an element, which violated Office of Personnel Management instructions contained at Federal Personnel Manual (FPM) Letter 430-4. FPM Letter 430-4 states that OPM has concluded that 5 U.S.C. Chapter 43 requires that a performance rating on any element can not be extrapolated more than one level above, or one level below a level for which there is a written standard. The letter goes on to say that each agency "must determine the number of performance levels essential for making accurate judgements about employee performance. There is no 'right' number." FPM Letter 430-4.

While the courts are undecided as to how much weight must be accorded to the FPM, *see Jankowitz* v. *United States,* 533 F.2d 538, 543, n. 3 (Ct. Cl. 1976); *Piccone* v. *United States,* 407 F.2d 866, 871 (Ct. Cl. 1969); *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 376 (8th Cir. 1974) (handbooks published by a government agency for the use of its employees are "guidance material only"), the Board has stated firmly that FPM instructions are only "guidance," and may never contravene a published regulation, *Mallory* v. *Department of the Army,* 3 MSPB 100 (1980). In this case, the FPM merely explains, and does not contravene, the applicable law or regulation. Neither 5 U.S.C. Chapter 43 nor 5 C.F.R. § 430 require a specific number of performance levels. The evidence file of the

Harman case contains a copy of the performance standards and appraisal used to measure the appellant's performance from November 1982 through November 1983. Agency submission Tab 1. The appraisal form is DL 1-381 (revised June 1981). Under the section on the form titled "Appraisal of Performance," five different definitions are listed with the instruction to the appraiser "Check the definition which describes the employee's overall performance during the rating period and sign below." The five definitions listed are:

> Outstanding Performance—Where performance exceeds the described level in the performance standards for all critical elements, and for 50 percent of the other elements. Performance does not fall below the standard for any element of the job.
>
> Highly Effective Performance—Where performance exceeds the described level in the performance standard for 50 percent or more of the critical elements. Performance does not fall below the standard for any element of the job.
>
> Satisfactory Performance—Where performance meets the described level in the performance standards for all critical elements.
>
> Minimally Satisfactory Performance—Where performance in one or more critical elements is slightly below standard.
>
> Unacceptable Performance—Where performance fails to meet the described level in the performance standard for one or more critical elements of the job.

Agency submission Tab 1.

The appraisal form then lists the appellant's job elements in vertical blocks.

The appellant's position has five elements. Next to each element block on the form is a standard block which states

what constitutes satisfactory performance of the element. The third block on the form is for the narrative performance appraisal of each element. The instructions for completing the narrative block state:

> In completing this section (1) state whether the employee has met, exceeded, greatly exceeded, needs improvement or failed to meet the requirements of the element as measured by the standard and (2) provide a brief explanation of the basis of the rating.

Agency submission Tab 1.

At the *Donaldson* hearing, the agency called Betty Lynt to testify regarding the agency's performance appraisal system in general, and form DL-1 381 (revised June 1981) in particular. Ms. Lynt is the Chief, Employment and Performance Appraisal Group Office of Policy and Standards, Department of Labor. She testified that she is familiar with the agency's performance evaluation system. She stated that she had frequently consulted with OPM regarding performance appraisals. She testified that in June of 1981, the agency's system was forwarded to OPM for review and approval and that OPM had approved the system in July of 1981. *See Donaldson* Joint Exhibit 1. Ms. Lynt also testified that supplemental documents had been sent to OPM as a part of the agency's appraisal plan implementation package. One of the supplemental documents forwarded to OPM was form DL-1-381 (revised June 1981). Ms. Lynt testified that the form was in OPM's files and that she had discussed the agency's appraisal plan with a representative from OPM. The appellant argued that OPM did not receive a copy of DL-1-381 (revised June 1981) and had not approved its use. However, Ms. Lynt testified that at meetings with OPM, the agency's plan was discussed with regard to the implications of FPM Letter 430-4. Ms. Lynt stated that

OPM determined that the plan would not have to be revised. Ms. Lynt explained that the defintions (met, exceeded, greatly exceeded, needs improvement, or failed to meet,) listed on DL-1-81 (revised June 1981), are only adjectives, (descriptors) of the employee's performance. They are not to be considered ratings used to compile overall summary ratings. She testified that the descriptors used in the narrative description block of the form are used to assist in making the overall summary rating, but are not actual ratings.

The appellant produced no evidence to rebut Ms. Lynt's testimony. I note that under law, once OPM has reviewed an agency's system, and determines that the system does not meet the requirements of 5 U.S.C. Chapter 43, OPM is required to direct the agency to implement an appropriate system or to correct operations under the system. 5 U.S.C. § 4304. No evidence was produced that the agency here was ordered by OPM to take any corrective action with regard to its system. I find that the agency has met its burden of proving that its performance appraisal system was approved by OPM. However, the Board recognizes that an approved system may have defects in its operation which result in injury to the employee. *Siegleman* v. *Department of Housing and Urban Development,* MSPB Docket Number DC0432810293 at n. 6 (January 10, 1983), citing *Alford* v. *Department of Health Education and Welfare,* 1 MSPB 305, 306 (1980). It is the appellant's burden to prove that the agency abused its discretion in establishing his performance standards, and to show how he was harmed by the application of the standards. *Hoesl* v. *Department of the Navy,* MSPB Docket Number SF04328310552 (March 1, 1984). In the *Harman* case, the appellant argued that he was harmed by the application of the standards because if the agency had

used a three tier sytem instead of a 5 tier system, the lowest rating the appellant could have received would have been minimally acceptable. The appellant produced no evidence to support this theory. The evidence file reflects that on August 29, 1983, the appellant was informed that his performance was unacceptable because he had not met the standards in two of his critical elements. A list of the reasons for the evaluation was provided to the appellant, and he was given a list of four specific goals for performance improvement. He was also informed that unless his performance improved to the minimally satisfactory level, he would not be retained in his position. The appellant failed to explain how the standards under which he was rated were not accurate, objective or specific. The appellant testified that before his appraisal period began, he was given the opportunity to submit comments and criticisms about the standards and appraisal form to his supervisor. Mr. Schoffstall (the appellant's supervisor) testified that no such feedback from the appellant was received. The appellant testified that he saw no need to file comments on the standards because the form had already been typed and would not be changed regardless of his comments. I find that the evidence before me shows that the appellant had ample opportunity to discuss his performance standards with his supervisor. There is nothing in the record to reflect that the appellant did not understand what performance was necessary to achieve a satisfactory appraisal. Furthermore, there was nothing ambiguous about the agency's notice to the appellant that his performance was unacceptable. I find no harmful error to the appellant in the application of the appraisal system, or in the way the standards were applied to him.

I will now consider the merits of the appellant's case.

In order to prevail in a Chapter 43 action, the agency is required to support its decision by substantial evidence, 5

U.S.C. § 7701(c)(1)(A). Substantial evidence is defined as "(t)hat degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." 5 CFR 1201.56(c)(1). The Board noted in *Parker* v. *Defense Logistics Agency,* 1 MSPB 489, 508 (1980), that the whole record as established must be considered. Evidence detracting from the agency's position as well as evidence supporting it must be weighed and considered. However, the substantial evidence standard obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons including the presiding official might disagree with that decision). *Id.* at 509. While the evidence of record may lend itself to more than one interpretation, in order to prevail, the agency must only demonstrate that its view is tenable and its action reasonable, not that no other course was logically possible.

In addition to carrying its burden under this evidentiary standard, the agency must also affirmatively show that the penalty chosen under this action was reasonable. *See Douglas* v. *Veterans Administration,* 5 MSPB 313 (1981). In this regard, the purpose of the Board's review of the penalty is to assure that the agency conscientiously considered the relevant factors, and in choosing the penalty, struck a responsible balance within the limits of reasonableness. *See Snipes* v. *United States Postal Service,* 6 MSPB 16 (1981); *Wanner* v. *United States Postal Service,* 6 MSPB 545 (1981); *Lancaster* v. *Department of the Navy,* 6 MSPB 528 (1981). In determining the appropriateness of the penalty, *Douglas* sets forth a sample of some of the relevant factors that should be considered

in making such a determination, but did not limit itself to those factors, noting that the circumstances of each case would determine which factors would be considered in an appeal.

In its notice of proposed removal dated February 3, 1984, the agency charged that the appellant's performance was unacceptable in two of the critical elements of his position. The first critical element in issue is: "Conducts inspections/investigations in coal mines." Agency submission Tab 1. The performance standard for this critical element is:

> Satisfactory performance is when:
>
> The uniform mine file system and other pertinent mine information is reviewed prior to inspection to assure inspector knowledge and familiarity with mine plans and previous conditions.
>
> Inspections/investigations are conducted at mines according to policies, procedures, and regulations. This will be measured by the supervisor during closeout discussions after each inspection/or travel with the inspector.

Agency submission Tab 1.

The second critical element in issue is: "Issues citations and orders of observed violations at coal mines." Agency submission Tab 1. The performance standard for this critical element is:

> Satisfactory performance is when:
>
> Citations and/or orders are issued for all violations observed and an onsite close-out conference is conducted upon completion of the inspection with the operator and/or miners' representative.
>
> No more than 10% citations/orders are returned by supervisor and/or assessments due to errors or omissions.

Agency submission Tab 1. To elucidate, the agency listed 11 specifications. However, the deciding official did not sustain one of the specifications, so only 10 will be considered. Those 10 specifications will be grouped according to similarities in the alleged performance deficiencies. The first group of specifications that I will analyze pertain to the appellant's alleged deficiencies with regard to mine inspections. The agency alleges that on two separate occasions, the appellant was assigned to conduct 103i spot inspections at the North Mountain Coal Company. The agency alleges that the appellant was supposed to go underground to inspect underground areas of the mine site on those occasions. The appellant stipulated that he had not gone underground to inspect the mine on either occasion. The appellant's immediate supervisor, Mr. Schoffstall, testified at the hearing. He indicated that North Mountain Coal Company had been placed on 103i inspection because of lack of ventilation, a methane problem and a pillar problem. Mr. Schoffstall explained that 103i inspections are initiated when a mine is found to have hazardous conditions. Those mines placed on 103i inspection must be inspected once every five work days. Mr. Schoffstall testifid that in 1983, a complete pillar had collapsed at North Mountain, and three men had been trapped. Mr. Schoffstall testified that it was not possible to conduct a proper 103i inspection without going underground, it that is where the miners are working. He said that when his inspectors are unable to go underground they should report to him. If early in the week, the inspector is to return to the mine but if an inspector is unable to complete an inspection by Friday, a memorandum to the district office is to be written, explaining why the inspection was not completed. Mr. Schoffstall testified that the appellant had not gone

underground at North Mountain on May 26 and August 18, 1983, and had not prepared any justification memoranda for the instances.

Another of the agency's inspector's, Edward Scotko, testified that he too had inspected North Mountain on a day the appellant was on leave. He testified that it was impossible to conduct a 103i inspection at North Mountain without going underground because the affected area (hazardous part) of the mine was underground. The appellant testified that on the two instances in question he did not go underground because on May 26, 1983, an air hose had broken and no one was working underground, and on August 18, 1983, all of the miners were coming to the surface due to a problem underground. He testified that on both occasions he performed a surface inspection, but did not go back to the mine later to try to conduct an underground inspection. He testified that he did not go back because he is on a quota system, and if he does not do his quota, he will fail his performance standards. He testified that 103i inspections require you to inspect the area where men are working. This if men are not working underground, there is no need to inspect underground. However, it appears that the only reason men were not working underground at North Mountain on May 26 and August 18, 1983, was due to hazardous conditions underground. I find that based upon the evidence before me, the appellant knew or should have known that 103i inspection at North Mountain on the dates in question required an underground inspection or a memo explaining why he had not gone underground.

Also, with regard to North Mountain Coal Company, the agency charged that the appellant had failed to properly conduct an inspection because he had failed to assure that the company was in conformity with its roof control

plan. Mr. Schoffstall testified that from July 28, 1983 through September 15, 1983, the appellant was in charge of inspections at North Mountain. The appellant's inspections did not note any improper method of pillar recovery being used by North Mountain. However, on September 23, 1983, nine days after the appellant's last inspection, Mr. Scotko inspected the mine and found violations regarding pillar recovery which exposed the miners to undue hazard. The appellant testified that when he was in the mine, nine days earlier, the mine was in compliance with the roof control plan. The agency tried to establish that the mine was not in conformance with the roof control plan when the appellant inspected it. Mr. Scotko testified that when he inspected the mine, they were working in the area of chutes 12 and 13. The appellant testified that on his inspection of the mine, the workers were in the area of chute 14. Mr. Scotko testified that in order for the work to have progressed that far after the appellant's inspection, the mine would have had to operate 3 shifts a day. Mr. Scotko indicated that he had learned from a North Mountain official that the mine had not operated that quickly. That official was not called to testify and considering the self-serving nature of the statement, I am not convinced that the coal mine did not advance more quickly. I find that the agency has not met its burden of proof with regard to the appellant's failure to find roof control plan violations at North Mountain. However, the agency has met its burden of proof with regard to the appellant's failure to properly conduct 103i inspections on May 26, 1983 and August 18, 1983.

The second type of deficient performance alleged by the agency is the appellant's failure to inspect/investigate Chestnut Coal Company on July 25, 1983. Mr. Schoffstall testified that the law requires a coal mine to have 3000

cubic feet of air per minute (CFM) unless a coal mine has obtained a waiver. The agency produced an inspection form signed by the appellant. The form indicates that the Chestnut Coal Company was inspected on July 25, 1983, and the air quantity found was 1600 CFM. Agency submission Tab 12b. The appellant testified that he had no idea where the 1600 CFM figure came from. He testified that he did not know whether the 1600 CFM notation was in his own handwriting. The former trainee who sometimes helped the appellant fill out forms is Stanley Andrzjeweski. Mr. Andrzjeweski testified that he did not take the air quantity measurements at Chestnut Coal Company on July 25, 1983, and had not even accompanied the appellant on the inspection. Mr. Andrzjeweski testified that he was not sure the calculations were his and if they were he did not know how he got the measurements, or who he got the numbers from. The agency file includes lab sample cards dated August 16, 1983, which indicate that on July 25, 1983 the air quality at Chestnut Coal Company was 9100 cubic feet per minute. Agency submission Tab 7. However, the issue is not whether the lab sample card is accurate, rather, the issue is whether the appellant certified on his inspection form that the air quantity at Chestnut Coal Company was 1600 CPM, and his failure to cite that as a violation. I find that even if Mr. Andrzjeweski made a calculation error on the inspection form, the appellant certified the numbers on the form to be correct when he signed the inspection form. Since the appellant took no action to correct the violation or correct the form, I find that the agency has met its burden of proof with regard to this instance of unacceptable performance.

Next, I will examine the allegations which relate to the appellant's alleged failures to issue citations.

In its notice of proposed removal, the agency alleged that the appellant had failed to issue citations at various mines for: improperly stored explosives, an electrical shock problem with a winch, a fan's power circuit which needed a bushing; and failure to have an escapeway. The agency also alleged that 4 of the 21 citations which had been issued by the appellant during his performance improvement plan (PIP) period contained errors or omissions.

Beginning with the four citations which allegedly had errors or omissions, the agency produced copies of the citations and/or orders in issue. Agency submission Tab 21-H. The agency contends that the appellant made an error in citation number 2100163 dated October 31, 1983, which required modification. Mr. Schoffstall, testified that the information in block 19 should have been in block 17. The appellant testified that he could not recall whether he had to modify that order. With regard to citation/order continuation number 2100168-01 dated November 4, 1983, the agency alleges that the appellant omitted making an entry in block 10. The appellant testified that he looked at his records and checked the copy that went to the mine operator. He stated that block 10 was checked on the copies he examined. He opined that his pen must have run out of ink so that the mark in block 10 was very light and did not show up when the agency made copies for its evidence file. The appellant did not produce any evidence that any copies of this form had block 10 marked.

The next alleged error was in citation number 2100175 dated November 17, 1983. The appellant admitted that he used the wrong mine I.D. number on the form, but added that "everyone makes mistakes." Finally, the appellant was charged with an omission on order number 2102340 dated October 4, 1983. The omission was the appellant's

failure to include his evaluation on the form. The appellant testified that the office policy must have changed between the time he filled out the form, and the time it was reviewed in the assessments office. He denied making any error and stated that Mr. Schoffstall had approved it.

Mr. Schoffstall testified that an evalation is to be included on all orders. He stated that the appellant's error had slipped by him, and had also eluded the district office, but had been returned by the assessments office. Agency submission 21-J. The appellant proffered no evidence of a change in policy which would account for his omission. I find that the agency has met its burden of proving that the four citations/orders issued by the appellant listed in the notice of proposal, contained errors and/or omissions.

With regard to the alleged improperly stored explosives, Mr. Schoffstall testified that during a June 1, 1983 inspection at North Mountain Coal Company, Mr. Schoffstall and several other inspectors and trainees accompanied the appellant on his inspection of the mine. Mr. Schoffstall testified that while in the mine he noticed an open box of explosives in plain view in an 8 foot wide gangway. He said the box was about 18″ by 22″ and about 8 inches high. Mr. Schoffstall testified that the explosives were improperly stored because explosives are to be stored away from areas where they could be struck or where they come in contact with electricity. Mr. Schoffstall testified that he did not personally cite the violation, nor did he allow another inspector to do so because the appellant was responsible for citing violations in that mine. Kenneth Hare, a former trainee who also accompanied the appellant on that inspection, testified that he too saw the box of explosives. He testified that it was against regulations to have explosives laying around like that, so he made a note of it. He stated that he did not cite the violation though because as a trainee, he was not allowed to.

The appellant testified that he did not cite the explosives as a violation because he had not seen them. During that same inspection, Mr. Schoffstall testified that he was informed by mine workers that a winch was giving off shocks. The mine workers are alleged to have given the appellant and Mr. Hare a similar report about the winch. Mr. Schoffstall testified that a shock problem in a wet mine was dangerous because it could lead to electrocution. Mr. Hare testified that he and the appellant discussed the shock problem. Mr. Hare stated that he thought the problem warranted a citation but the appellant demurred saying they needed electrical equipment to check the winch. Mr. Hare testified that electrical equipment was not needed to test the winch, and that if the decision had been his, he would have written a citation for it. The appellant testified that during his inspection, a miner told him that the miner was getting a shock from a piece of equipment. The appellant indicated that miners were not to be believed because they were lazy, ex-convicts who would say anything to get out of work. The appellant added that a piece of wood was being used to operate the winch but he did not know whether the miner was using the wood to avoid shocks, or whether he was using the wood to make his reach shorter. The appellant added that the winch was not necessary to the mining of coal. He said the miners could push the carts by hand. The appellant testified that he told the foreman to take the winch out of service, but did not think that it warranted a citation. He added that the agency's electrician had just checked the mine's ground fault system which worked like a circuit breaker. He implied that if any problems occurred with electricity, the ground fault system would shut off the electrical current and thereby avoid injury to the miners.

The third similar incident of this type occurred on November 17, 1983, at Two Way Coal Company. The

agency alleges that the appellant failed to cite improperly stored explosives. Again, Mr. Schoffstall testified that he accompanied the appellant on the inspection and personnally observed the explosives. He testified that the appellant passed within 2 feet of the explosives, but failed to cite them. The appellant testified that it was easier for the miners if they took dynamite with them to their jobs rather than climb down to get dynamite when they were actually ready to use it. He testified that when he left the mine that day, the drilling was finished and the miners were loading dynamite into the holes. *See* Agency submission Tab 7, attachment 2. Mr. Schoffstall testified that the dynamite should not be left in the open for hours. He testified that the company should have been cited, but the appellant overlooked it.

Based upon the evidence before me, I find that the appellant should have seen and cited the explosives which were improperly stored at North Mountain. With regard to the winch at North Mountain and the explosives at Two Way, it appears that the agency's determination that the appellant's performance was deficient, was reasonable. As an inspector, it is the appellant's job to observe and cite health and safety violations. I am convinced that he failed to do this on three cited occasions, which could have led to the inury or death of miners. The agency has met its burden of proof with regard to those instances.

The last two alleged instances of unacceptable performance involve the appellant's failure to cite North Mountain Coal and H.A.T. Coal for not having proper escape ways, and the failure of K & L Coal Company to maintain a bushing on its main surface fan's power circuit. With regard to the fan, Mr. Schoffstall testified that on October 12, 1983, he and the appellant were at K & L Coal Company, where Mr. Schoffstall observed that a bushing was

needed. He testified that he told the appellant of the violation. He said he and the appellant left the area and the appellant had not written the citation until October 13, 1983. The appellant stipulated that he observed the violation on October 12, but had not written it on October 12, 1983 because Mr. Schoffstall was ready to leave. The appellant testified that Mr. Schoffstall told him to tell the mine operator to have the fan cable fixed. Mr. Schoffstall denied requesting the appellant to leave before he could take any action. He also denied telling the appellant that he was ready to go and that the appellant could write the citation later. The appellant wrote a citation for the fan the next day. According to Mr. Schoffstall, observed violations are to be cited on the spot. This was not disputed by the appellant. I find that the appellant should have cited the fan on October 12, 1983.

Finally, with regard to the escapeways, Mr. Scotko testified that he inspected North Mountain Coal Company on September 23, 1983, (a little over one week after the appellant inspected it). He testified that the pillar removal method being used when he conducted his inspection was not authorized and was unsafe. He said that in that area, an escapeway could not be maintained. *See* Agency's Exhibit 4. The appellant testified that when he performed his inspection the mine was in compliance with the roof control plan, and that the area Mr. Scotko inspected was different from the area the appellant had inspected. Since I am not convinced that the appellant and Mr. Scotko were observing the same area of the mine, I find that the agency has not met its burden of proof with regard to this charge. The last example of this sort, concerns a second escapeway at H.A.T. Coal Company. The appellant inspected the mine on September 8, 12, 13 and 26, 1983. He testified that on his inspections he found that a second escapeway

was not needed because the mine was just being developed. He explained that if you are just developing a mine, cross cuts that lead to a second escapeway must be made after the mine has progressed 60 feet. He stated that when he inspected the mine, they had only advanced a few feet, but he never measured exactly how far they had advanced. The appellant's inspection notes were proffered by the agency. Agency submission Tab 20-B. Those notes state: "new mine presently developing in slope and driving a slant on the east side to connect a second opening." Tab 20-B. However, Mr. Scotko testified that he inspected H.A.T. Coal Company on November 21, 1983, and issued a citation for failure to provide a second escapeway. Mr. Scotko drew a sketch of the mine as it appeared on November 21, 1983. Agency submission Tab 20-A. His sketch shows that the east slant (which connects with an incomplete escapeway) was not begun until the main slope had been advanced 175 feet. His sketch also shows a second off shoot from the main slope (which also connects partially to the completed escapeway) which appears to have been begun when the main slope had been advanced 60 feet. If Mr. Scotko's drawing is compared with the appellant's notes, it would appear that the appellant was referring to the east slant in Mr. Scotko's drawing. That would mean the mine had advanced at least 175 feet without a second escapeway, and should have been cited by the appellant. However, the appellant testified that Mr. Scotko's sketch did not depict the state of the mine when the appellant inspected it. The appellant maintains that the mine had not advanced 175 feet and the east slant portrayed in Mr. Scotko's drawing was not in existence when the appellant inspected the mine. Due to the two month gap between Mr. Scotko's inspection and the appellant's inspection, and considering the persuasiveness of the ap-

pellant's testimony, I find that the agency has not met its burden of proof with regard to this allegation.

In summary, I find that the agency has produced substantial evidence that the appellant's performance was unacceptable with regard to three specifications which relate to critical element number 1, and with regard to four specifications which relate to critical element number 2. 5 U.S.C. § 4302(b)(6) requires that an agency provide for "reassigning, reducing in grade, or removing employees who continue to have unacceptable performance but only after an opportunity to demonstrate acceptable performance." I note that the appellant was issued a performance improvement plan and given 90 days to reach acceptable performance. The appellant's performance remained at an unacceptable level of performance. I find that the agency extended the appellant the opportunity to demonstrate acceptable through the performance improvement plan. The Board has held that "An Agency may reduce in grade or remove an employee at any time during the performance appraisal cycle when the employee's performance in one or more critical elements of the job becomes unacceptable after giving the employee a reasonable time to demonstrate acceptable performance before proposing the reduction in grade or removal. *See* 5 C.F.R. § 432.203(a) and (b)." *Tobias v. Department of Housing and Urban Development,* MSPB Docket Number CH04328210127 at 2 (January 25, 1984).

In cases brought under Chapter 75, including performance-based ones, the agency is required to establish that the penalty it imposed upon the employee in question was appropriate and reasonable under all the circumstances. *Eq., Nesson v. Department of the Treasury,* MSPB Docket No. PH04328110123 (May 6, 1982); *Douglas, supra.* The relevant factors to be considered in deter-

mining whether the agency's action was reasonable in this case are 1) the appellant's past work record; 2) the effectiveness of an alternate sanction; and 3) other mitigating circumstances. Although the Board has not specifically held that a *Douglas* analysis is appropriate for performance cases under 5 U.S.C. Chapter 43, for purposes of this case, I will apply the *Douglas* analysis. The appellant had approximately 15 years of service with the agency. Agency submission Tab 1. There was no evidence proffered that prior to his last rating period, his performance had ever been rated unsatisfactory. However, during the appellant's final year, he was placed on a performance improvement plan (PIP). Agency submission Tab 1. The PIP period began on August 29, 1983 and ended on November 30, 1983. Agency submission Tab 2. The deciding official, John Shutack, testified that he was aware that the appellant had been placed on a PIP. I note that the PIP plan issued to the appellant specifically stated that the PIP was being instituted because the appellant's performance was unacceptable because he had not met the standards for critical elements 1 and 2. Agency submission tab 2. Mr. Schoffstall testified that between July 1982 and August 1983, he concluded that the appellant had failed his performance standards, so the PIP was instituted. Mr. Schoffstall testified that he had discussions with the appellant regarding his performance throughout the year. Mr. Schoffstall said that he pointed out where and why the appellant was failing. The agency provided a list of 18 dates on which Mr. Schoffstall is alleged to have had meetings with the appellant regarding performance. At the hearing, the appellant disputed 10 of the dates, but appears to only dispute the accuracy of the dates, and not that the meetings took place. The appellant admitted that he had almost daily contact with Mr. Schoffstall. The

agency has already established that the appellant's performance was unacceptable on specific occasions after the institution of the PIP. Mr. Schoffstall testified that he determined that the appellant should be dismissed. Mr. Schoffstall signed the notice of proposed removal. Agency submission Tab 3.

Mr. Shutack testified that he had personally ordered his subordinate to do everything possible to get the appellant off of the PIP (raise his performance to an acceptable level). Mr. Shutack testified that when he received the notice of proposed removal, he considered the alternatives of not taking any action, a transfer or a downgrade. Mr. Shutack testified that he had transferred the appellant in the past. The appellant testified that his past transfer had been at his own request. Mr. Shutack testified that he had seriously considered downgrading the appellant, but the inherent duties and responsibilities of a mine inspector would remain the same even at a lower grade. Mr. Shutack testified that the evidence he had regarding the appellant's performance, showed that the appellant, a grade 12 inspector, could not perform even as a grade 9 inspector. Mr. Shutack testified that he chose removal because of the appellant's failure to cite dangerous conditions at mines. Mr. Shutack testified that he was convinced that Mr. Schoffstall had done everything he could to "turn him [Harman] around." I find that the agency considered the relevant factors and chose a reasonable penalty.

Finally, I will consider the appellant's affirmative defenses. The appellant argued that the agency committed harmful error. It is the appellant's burden to show harmful error in the application of the agency's procedures in arriving at its decision. *See* 5 C.F.R. § 1201.56. The appellant alleged that the agency committed harmful procedural error by removing him for performance deficiencies which

occurred prior to his PIP. The presiding official could find no law, rule or regulation which limits an agency's consideration of performance deficiencies to the time period of an employee's PIP. Agencies are not required to ignore unacceptable performance which occurred outside of a PIP period as long as the performance in issue occurred within the employee's appraisal period it may be considered by the agency. *See generally* 5 C.F.R. § 430.204. The appellant's original appraisal period was from November 23, 1982 through September 4, 1983. *See* Agency submission Tabs 2 and 3. However, the appellant's appraisal period was extended through November 30, 1983, pending conclusion of his PIP. All of the instances of unacceptable performance cited by the agency in its notice of proposed removal occurred within the appellant's appraisal period. I find no procedural error in the agency's action. The appellant also argued that the deciding official had actually decided to remove the appellant before the appellant had an opportunity to perfect the summary of his oral response to the charges. To prove this allegation, the appellant produced a request for personnel action form signed by Mr. Shutack, dated March 2, 1984. The form is a request for the appellant's involuntary termination to be effective March 13, 1984.

Mr. Shutack testified that although he sent the request for personnel action forward, he had not yet decided to remove the appellant. He testifed that he sent in the request so that he would have the paperwork if he decided to remove the appellant. He also indicated that he sent in the request with the understanding that the paperwork could be cancelled if he decided not to remove the appellant. Mr. Shutack testifed that he made his decision to remove the appellant on March 12, 1984. I find Mr. Shutack's testimony persuasive. *See Weaver v. Department of the Navy,*

2 MSPB 297 (1980) *aff'd* 669 F.2d 613 (9th Cir. 1982). I find no procedural error on the part of the agency.

Next, the appellant argued that the agency had discriminated against him by failing to reasonably accommodate his handicapping condition. Discrimination based upon a handicapping condition is a prohibited personnel practice. 5 U.S.C. § 2302(b)(1)(D). The appellant bears the burden of proof with regard to allegations of discrimination. *Loeb v. Textron,* 600 F.2d 1002, 1011-1012 (1st Cir. 1979).

If the appellant establishes that he is a qualified handicapped person, 29 CFR § 1613.702(f), for the purposes of employment, and that the agency has failed to accommodate his handicapping condition, a *prima facie* case raising an inference of handicap discirmination by the agency will be established. *Stalkfleet v. United States Postal Service,* 6 MSPB 536, 542-44 (1981). The first step is to prove that he is a qualified handicapped person. A qualified handicapped person is defined in 29 CFR 1613.702 as follows:

> (a) "Handicapped person" is defined for this subpart as one who: (1) Has a physical or mental impairment which substantially limits one or more of such person's major life activities.
>
> . . .
>
> (c) "Major life activities" means functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> . . .
>
> (f) "Qualified handicapped person" means with respect to employment, a handicapped person who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others. . . .

See Ignacio v. United States Postal Service, MSPB Docket No. SF07528110438 (September 16, 1983).

The appellant alleges that the agency failed to accommodate his poor eyesight. The agency produced a memorandum from Robert Cargill, Mine Safety and Health Administration Employee Safety Manager, dated September 6, 1983. The memorandum indicates that the appellant was given vision tests on July 17, 1983, and that the results were the the appellant "probably needs a correction in order for him to do close work, such as reading." Agency Exhibit 1. The agency also produced evidence that the appellant was given an eye examination on or about August 8, 1983, and was issued a pair of glasses by the Department of Labor on September 9, 1983. Agency's Exhibit 2. Needing a pair of reading glasses does not render this appellant a qualified handicapped person because there was no evidence proffered that the appellant's impaired eyesight had substantially limited one of his major life activities. Therefore, I find that the appellant has not met his burden of proving that he is a handicapped person. But even if he had so proven, upon receipt of his eyeglasses, his eyesight could not long be said to impair his ability to engage in a major life function. *See Reeder v. Department of Housing and Urban Development,* 11 MSPB 218, 219 (1982). Furthermore, I find that the agency reasonably accommodated the appellant's vision impairment by providing the appellant with glasses. I note that three of the proven specifications of unacceptable performance, occurred after the appellant's receipt of his glasses. Therefore, I find the appellant's discrimination argument to be without merit.

Lastly, the appellant made several vague conspiracy allegations regarding Mr. Schoffstall, Mr. Shutack and Mr. Scotko. The appellant argues that Mr. Schoffstall,

Mr. Shutack and Mr. Scotko were involved in illegal activities, and concocted lies about the appellant's performance in an effort to shift the spotlight from themselves onto the appellant. The appellant produced absolutely no evidence of illegal activities by Mr. Schoffstall, Mr. Shutack or Mr. Scotko nor did he produce any evidence that the three had conspired against the appellant. I find no basis upon which to reverse the agency's decision.

DECISION

The agency's decision is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Aug. 14, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

The appellant has the right to petition the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E St., N.W., Washington, DC 20507, to consider the Board's final decision on the issue of discrimination, either when this initial decision becomes final on the date set forth above or after final Board action when appellant has petitioned the Board for review or the Board has reopened the case on its own motion. The appellant may file a civil action in court without either petitioning the EEOC or the Board or after either body had rendered a final administrative decision. Either a petition or a civil action may be filed, but not both, no later than 30 days after the Board's decision has become final. Appellants who choose to file an action in a district court also have the right to request the court to appoint a lawyer to represent them, and to request that prepayment of fees, costs, or security be waived.

Except for actions filed under the antidiscrimination laws, the appellant has the right to seek judicial review of the Board's final decision on this appeal pursuant to 5 U.S.C. § 7703(b)(1). A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the Board's final decision.

For the Board:

/s/ EVE MONTGOMERY

Eve Montgomery
Presiding Official

Initial Decision Number: PH04328410287

JAMES D. HARMAN

v.

DEPARTMENT OF LABOR

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DECISION was sent by regular mail this date to each of the following:

APPELLANT

JAMES D. HARMAN
RD #1
Sacramento, PA 17968

APPELLANT'S REPRESENTATIVE

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10 JUL 1984
Date

/s/ ROSE R. MORAN
Rose R. Moran, Legal Clerk
Philadelphia, Pa

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

Petition No. 03850169
MSPB No. PH04328410287

JAMES D. HARMAN, PETITIONER

v.

DEPARTMENT OF LABOR, AGENCY

DECISION

INTRODUCTION

On May 13, 1985, James D. Harman (hereinafter referred to as petitioner) timely initiated a petition for review by the Equal Employment Opportunity Commission of the final opinion and order of the Merit Systems Protection Board (MSPB), concerning his allegations of discrimination based on handicap (poor eyesight) in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701 *et seq.* Because the petition involves an action occurring subsequent to January 11, 1979, the effective date of the Civil Service Reform Act of 1978, it is governed by the provisions of that Act and EEOC Regulations 29 C.F.R. § 1613.414 *et seq.*

BACKGROUND

At the time of the alleged discrimination, petitioner was employed as a Coal Mine Safety and Health Inspector, GS-12, by the Department of Labor (hereinafter referred to as agency). On February 3, 1984, the agency proposed removing petitioner for failure to meet critical elements of

his position for conducting inspections and investigations in coal mines. After the effective date of the removal, March 13, 1984, petitioner appealed this action to the MSPB, raising allegations of handicap discrimination.

The record shows that in August 1983 the agency issued petitioner a Performance Improvement Plan (PIP) for the period from August until November 30, 1983, based on the agency's evaluation that petitioner's performance was unacceptable since he had not met the standards of two critical elements for his position. MSPB Record at 341-344. In the Plan, the agency advised that if petitioner's performance was unacceptable upon completion of the PIP period, action would be taken to propose petitioner's removal, reassignment or a reduction-in-grade. Petitioner was further advised that he would not be retained in his position unless his performance improved to the minimally satisfactory level. The critical elements cited were: (1) "Conducts inspections/investigations in coal mines"; and (2) "Issues citations and orders of observed violations at coal mines." *Id.*

On February 3, 1983, the agency issued its Notice of Proposed Removal. In the Notice, the agency specified five situations under the first critical element wherein petitioner had allegedly failed to conduct his inspection/investigation in accordance with procedures and regulations. The agency cited six instances under the second critical element where petitioner had allegedly failed to issue citations for violations he had observed during his inspections. The proposing official, petitioner's supervisor, noted that in issuing the Notice, he had considered that petitioner's less than satisfactory performance had been consistently reviewed beginning in January 1983 and that the PIP had been issued because of petitioner's failure to improve. The official further noted that he had met with petitioner eighteen times during the course of the PIP to

assist petitioner in improving his performance. The official then stated that despite these efforts, petitioner's work performance continued to be unacceptable. MSPB Record at 242-250.

Petitioner responded in a February 7, 1984, letter contending that his supervisor had failed to consider petitoner's loss of eyesight requiring that petitioner wear glasses and that these glasses were not received until his PIP was half over. Petitioner also disagreed with several of the instances cited, alleging that the Notice was an attempt to have him drop his prior filed unfair labor practice charge against the agency. MSPB Record at 181-183.

The record shows that petitioner responded orally to the Notice of February 24, 1984. MSPB Record at 174-180. In neither the written nor the oral response did petitioner allege a handicap or allege handicap discrimination.

In the March 12, 1984, Decision to Remove, the deciding official noted that he had considered a downgrade, in lieu of removal, but that his alternative was not appropriate because petitioner had not shown an ability to improve during his PIP. This official also stated that there were no positions to which petitioner could be reassigned.

The record shows that in his first appeal of the removal to the MSPB, dated March 14, 1984, petitioner did not allege any discrimination by the agency. MSPB Record at 198-200.

In an amended appeal, dated March 23, 1984, petitioner alleged handicap discrimination contending that the agency had not accommodated his handicap (poor eyesight).

In response to this allegation, the deciding official testified that the agency safety officer had supplied a memorandum stating that glasses were provided to peti-

tioner in response to a grievance he had filed. Hearing Tape (HT)[1], Side 7B.

The record shows a September 6, 1983, memorandum to the deciding official from the safety manager stating the visual test results from petitioner's July 17, 1983, physical examination. According to the memorandum, the visual screening test showed that petitioner had "better than normal far visual acuity . . ." and his near visual acuity showed he "probably needs a correction in order for him to do close work, such as reading." MSPB Record at 107.

The record also shows an August 12, 1983, requisition for petitioner's safety executive glasses (MSPB Record at 106) and a receipt showing the glasses were issued on September 8, 1983. MPSB Record at 105.

It should be noted that there was no testimony or evidence in the record to document that petitioner had a visual handicap.

In the initial decision, the Presiding Official (PO) found that petitioner had not shown he was handicapped; but that even if petitioner had so proven, petitioner's ability to engage in a major life function was no longer impaired with the issuance of the eyeglasses. The PO found that the agency had reasonably accommodated petitioner by providing petitioner with glasses. MSPB Record at 94. Petitioner petitioned the Board to review the initial decision. In the petition, petitioner did not address the allegation of handicap discrimination. MSPB Record at 43-44. The Board, in its final opinion and order, addressed other issues raised by petitioner in his petition. It should be noted that the record, provided to the Commission by the MSPB, did not contain a copy of the Board's decision but that petitioner provided a copy with his submission of a petition for review of the Board's decision.

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[1] Since a transcript of the MSPB hearing was not provided to the Commission, references are made to the tapes of the hearing.

In the petition to the Commission, petitioner again alleged handicap discrimination. However, petitioner did not submit any additional evidence to substantiate his allegations.

ANALYSIS AND FINDINGS

The Commission must determine whether the decision of the Board *vis a vis* the allegations of handicap discrimination constitutes an incorrect interpretation of law, rule, regulation or policy directive or whether the Board's decision is supported by the evidence in the record as a whole.

The threshold question in this case is whether petitioner is a handicapped employee to whom the agency has an obligation of reasonable accommodation.

EEOC Regulation 29 C.F.R. § 1613.702(a) defines a handicapped person as one who has a physical or mental impairment that substantially limits one or more of such person's major life activities. Major life activities include such functions as walking, seeing, hearing, speaking, breathing, learning and working.

The record here is devoid of any evidence to show that any of the petitioner's major life activities were substantially limited. At most, petitioner's eye examination indicated he probably needed a correction for close work, such as reading. This condition was easily corrected by glasses. Therefore, the Commission finds that petitioner has failed to show he was handicapped.

Assuming *arguendo* that his condition was a handicap, the record and testimony show that petitioner was reasonably accommodated by the agency when it issued him prescription safety glasses.

Regarding petitioner's contention that he was not issued glasses until his PIP was half over, the record shows that

he was placed on the PIP on August 29, 1983, and that his glasses were issued on September 8, 1983. It is clear that any deficiencies that may have existed in petitioner's performance were not due to difficulties in reading.

The record shows that the Board found petitioner's removal was not based on handicap discrimination. For the above reasons, the Commission concurs with the Board and finds that petitioner failed to establish that his removal was based on handicap discrimination. *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

CONCLUSION

Based upon a review of the record, it is the decision of the Equal Employment Opportunity Commission to concur with the final decision of the Merit Systems Protection Board which found no discrimination in petitioner's removal.

A statement of petitioner's rights (R-3) is attached to this decision.

FOR THE COMMISSION:

January 27, 1987 — Date

/s/ CYNTHIA CLARK MATHEWS
Executive Officer
Executive Secretariat

[SEAL]

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20507

STATEMENT OF PETITIONER'S RIGHTS

NOTICE OF RIGHT TO FILE A CIVIL ACTION

If, in the attached decision, the Commission either denied consideration of your petition or concurred in the decision of the Merit Systems Protection Board, the decision of the Commission is final, and there is no further right of administrative appeal from the Commission's decision. However, you have the right to file a civil action in the appropriate United States District Court, based on the decision of the Merit Systems Protection Board, *WITHIN THIRTY (30) DAYS* of the date that you receive the Commission's decision. *See* 29 C.F.R. §§ 1613.421(c) and (d). You are further notified that if you file a civil action *pro se* (in your own behalf), *YOU MUST PROVIDE THE NAME OF THE APPROPRIATE DEPARTMENT OR AGENCY HEAD i.e.,* one acting in an official capacity, named as defendant. Failure to provide the name of the *HEAD OF THE DEPARTMENT OR AGENCY* may result in the loss of any judicial redress you may be entitled to.

If, in the attached decision, the Commission does not concur with the decision of the Merit Systems Protection Board, your case is being referred back to the Board for further consideration. You have the right to file a civil ac-

tion in the appropriate United States District Court, based on the decision of the Board:

1. *WITHIN THIRTY (30) DAYS* after you receive notice of the decision of the Board to concur in the attached decision of the Commission [*see* 29 C.F.R. § 1613.421(e)]; or
2. If the Board decides to reaffirm its original decision, *WITHIN THIRTY (30) DAYS* of the date you receive notice of the final decision of the Special Panel to which your case will then be referred [*see* 5 U.S.C. § 7702(d) and 29 C.F.R. § 1613.421(f)]; or
3. You may also file a civil action if you have not received a final decision either from the Merit Systems Protection Board or the Special Panel within one hundred and eighty (180) days after the date you filed your Petition for Review with the Commission.

Regardless of what the Commission decided in the attached decision, if any of your claims of discrimination were based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 633a), as amended, *AS TO THOSE CLAIMS ONLY*, you *MAY* have up to six years after the right of action first accrued in which to file a civil action. *See Lehman* v. *Nakshian*, 453 U.S. 156 (1981); 29 U.S.C. § 633a(f); and 28 U.S.C. § 2401(a).

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 791 and 794c, as amended, you may request that the Court appoint an attorney to rep-

resent you. The Court may, in its discretion, appoint an attorney to represent you and may also permit you to file the civil action without payment of fees, costs, or security. If you want to request appointment of an attorney, your request must be *FILED WITH THE COURT WITHIN THE TIME LIMITS FOR FILING A CIVIC ACTION,* discussed above.

/s/ DOLORES L. ROZZI
Dolores L. Rozzi, Director
Office of Review and Appeals

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